STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Illinois Bell Telephone Company	)	
	)	
Application for Review of Alternative Regulation Plan	)	Docket No. 98-0252
	)	
Illinois Bell Telephone Company	)	
	)	
Petition to Rebalance Illinois Bell Telephone Company's Carrier Access and Network Access Line Rates	)	Docket No. 98-0335
	)	
Citizens Utility Board, People of the State of Illinois	)	Docket No. 00-0764
v.	)	
Illinois Bell Telephone Company	)	(Consol.)

SECOND BRIEF ON EXCEPTIONS OF AMERITECH ILLINOIS

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Illinois Bell Telephone Company ("Ameritech Illinois" or "the Company"), by its attorneys, hereby submits its Second Brief on Exceptions in the captioned proceeding. By order of the Hearing Examiners, these Exceptions are limited to those issues which have been decided in whole or in part based on the new legislation (Public Act 92-22).

I. SUMMARY OF POSITION

Generally, the changes which the Hearing Examiners have made to the Proposed Order correctly reflect the impact of the new legislation. However, Ameritech Illinois believes that the Proposed Order's recommendation that a three-basket structure be maintained under the Plan on a going-forward basis is inappropriate given the legislative mandate regarding service packages and other policy considerations. In addition, the Proposed Order reaches conclusions on the term of Ameritech Illinois' merger commitment regarding wholesale service performance and the associated remedy plan which were not advanced by any party to this proceeding and which cannot be squared with the plain language of the Merger Order. Order in Docket 98-0555, adopted September 23, 1999 (the "Merger Order").

II. STRUCTURE OF THE BASKETS

As currently structured, the Alternative Regulation Plan contains four service baskets: Residence, Business, Carrier and Other. Order in Dockets 92-0448/93-0239, adopted October 11, 1994 (1994 Order), at pp. 68-69. At the outset of this proceeding, the Company proposed that all services which remain under the Plan should be consolidated into a single basket on a going-forward basis. In the alternative, Ameritech Illinois proposed that, at a minimum, all residence services should be consolidated in the Residence basket (i.e., that the Residence and Other baskets be combined). (Am. Ill. Init. Br., p. 45). Staff and GCI urged continuation of the existing basket structure to protect against discrimination between customer groups. (Staff Ex. 13.0, pp. 31-32; GCI Ex. 1.0, pp. 45-46). The Hearing Examiners' original Proposed Order recommended continuation of the four-basket structure. (HEPO, Section V, 2, Commission Analysis and Conclusion, par. 1).

Subsequently, in light of the amendments to the Public Utilities Act, all parties agreed that the basket structure issue should be revisited and the Proposed Order does so. (PEPO, pp. 104-07.) Under new Section 13-502.5, all business services are now classified as competitive as a matter of law. As a result, consistent with the views of most of the parties, the Proposed Order properly concludes that there should be no Business basket under the Plan on a going-forward basis.[1] This recommendation should be affirmed by the Commission.

The remaining issues -- over which there is more dispute -- involve which basket the service packages mandated by Section 13-518 of the Act should be assigned to and whether the Residence and Other baskets should be consolidated in light of this package requirement and other policy objectives.[2]

The Proposed Order properly concludes that the mandated packages should be assigned to the Residence basket. (PEPO, p. 106). However, Ameritech Illinois believes that the rationale advanced in the Proposed Order for this assignment is misplaced in certain respects. The Proposed Order relies heavily on the fact that the residence network access line is a "consistent element" in each of the mandated packages, that it has "traditionally been found within the Residential basket" and that it is the "cornerstone of residence services". (PEPO, p. 106). These are true statements, but they have only limited relevance in determining basket assignments. As the Proposed Order itself recognizes, Ameritech Illinois may itself introduce voluntary packages which include a network access line, local usage and vertical features.[3] In fact, given current trends in the industry, calling plans which include network access lines are likely to be the rule, not the exception, in the future. These voluntary plans are discretionary and would be assigned to the Other basket. Thus, whether or not a network access line is included in a calling plan will

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1 The only party objecting to elimination of the Business basket was AT&T, which proposed moving resold business services from the Carrier basket into the Business basket. The Proposed Order properly rejected this proposal. (PEPO, p. 104).

2 Ameritech Illinois also proposed that the Carrier basket be eliminated, because UNEs, resold services and carrier access services should not be subject to the price index. (Am. Ill. Br. on Exceptions, pp. 21-27). The Proposed Order's conclusions on this issue are still wrong as a matter of law and must be changed. However, nothing in the legislation impacts these arguments and they will not be addressed again here.

3 In fact, Ameritech Illinois has just introduced three such packages. Two of them became effective on October 15, 2001, and the third will become effective on October 22, 2001 (Ill. C.C. No. 20, Part 7, Section 5, 3rd Revised Sheets 26-27, Original Sheet 28, 6th Revised Sheet 23, 5th Revised Sheet 24, 3rd Revised Sheet 25, 4th Revised Sheet 20, 3rd Revised Sheet 21 and 4th Revised Sheet 22, administrative notice requested).

become less and less relevant as a way to distinguish Residence basket plans from Other basket plans.

Accordingly, the Company urges the Commission to modify the rationale for this conclusion. In the Company's view, the most significant distinguishing feature between the mandated plans and other voluntary plans which Ameritech Illinois has and may develop in the future is the fact that the voluntary plans can be withdrawn or modified by Ameritech Illinois in response to marketplace conditions. Thus, they are "discretionary" from both the customer's perspective and the Company's perspective. In contrast, the mandated plans will be a permanent part of the Company's overall rate structure and may not be withdrawn or modified, except in conformance with Section 13-518. Therefore, it is appropriate to include the mandatory plans in the Residence basket with other core residence services.

The Proposed Order properly rejects GCI/City's proposal to create a new basket solely for the mandated packages. (PEPO, p. 106). However, the rationale provided for this conclusion also rests too heavily on the fact that network access lines are part of the packages. A better rationale is that GCI/City's basis for their proposal is not supported by the facts. GCI/City contended that, if the mandated packages were placed in the Residence basket, Ameritech Illinois could "raise access rates so that customers are driven to packages even if they do not suit their needs" and/or increase the prices for the mandated packages and "thwart the legislature's intent that the packages would result in savings". (PEPO, p. 98). These scenarios fly directly in the face of past experience and ignore the other terms of the Plan. Extremely rigid pricing limitations apply to each and every service under the Plan, not to the baskets as a whole. As a practical matter, the Company has not had and will not likely have in the future the ability to increase rates for some services within a basket and offset them with decreases on others, as

GCI/City suggest. It is undisputed that Ameritech Illinois has not increased the price of any service under the Plan to date. This circumstance is not likely to change, given the Proposed Order's recommendation that the Company be afforded no additional pricing flexibility. The debate over increases in network access line prices in this proceeding demonstrates just how difficult any such price changes are likely to be. Thus, GCI/City's pricing concerns are unwarranted and their proposal should be rejected on that basis.

More importantly, the Proposed Order seriously errs when it continues to reject Ameritech Illinois' proposal to consolidate the Residence and Other baskets. Under the Proposed Order, there will be three baskets:

- Residence basket (containing residence network access lines, Bands A and B usage and the mandated packages, which will include many of the Company's vertical features);
- Carrier basket (containing resale services, carrier access services and UNEs); and
- Other basket (containing residence vertical features not subscribed to through the mandated packages, nonrecurring charges, all other optional calling plans and miscellaneous services).

The Proposed Order's principal rationale for continuing the Residence and Other baskets is a concern that Ameritech Illinois would be able to contravene the legislative intent underlying the new mandated packages by increasing their prices. (PEPO, p. 107). According to the Proposed Order, the Company could "easily raise prices for the packages over time and still meet the basket pricing constraint by reducing prices of high margin services." (Id.) As described above, this is incorrect. The Plan's pricing rules apply to each and every service within a basket. The Company will not be able to increase the prices for the mandated packages at all if current economic conditions continue.[4] Therefore, the suggestion that Ameritech Illinois will be able to offset significant increases in mandated package prices with decreases in other services is simply incorrect. In short, Ameritech Illinois will be no more able to increase the price of the mandated packages in a combined Residence/Other basket than in a stand-alone Residence basket.

The Proposed Order further contends that such hypothetical pricing actions could contravene the legislative directive in Section 13-518 that the mandated packages be priced to produce savings for the "average" customer. (PEPO, p. 107). Again, this is incorrect. Even if the Company could increase these prices in the way the Proposed Order suggests -- which it cannot -- Section 13-518 remains unchanged. The Company must continue to maintain prices on the mandated packages which meet the requirements of Section 13-518, regardless how the baskets are structured. Thus, Section 13-518 operates as a separate constraint on Ameritech Illinois' pricing flexibility relative to these packages, above and beyond the other pricing limitations that are part of the Plan.

Since neither of these rationales supports rejection of Ameritech Illinois' basket consolidation proposal, the Commission must address on their merits the justifications for combining the Residence and Other baskets which Ameritech Illinois has advanced. The Proposed Order does not do so.

First, the policy objectives which supported the initial establishment of these two baskets have largely evaporated. The baskets, generally, were established to ensure nondiscrimination

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4 Under the current and proposed plan structure, as long as GDPPI remains low and there are no positive exogenous changes, only rate reductions are permitted: the Plan limits rate changes on any service subject to the Plan to 2% + [GDPPI — 4.3%].

Even if the inflation rate were to increase, the Company would only be able to increase the price of any individual service by 2% more than GDPPI — 4.3%. For example, if GDPPI were 4.3%, the Company could raise individual service prices within the basket by no more than 2.0%. These increases would have to be fully offset by price decreases to other services in the basket to ensure no change in the API (in this scenario, the change in the PCI would be 4.3% — 4.3%, or 0). Any rate changes permitted under this scenario would obviously be extremely modest.

between major customer classes. 1994 Order, p. 190. This policy goal no longer has application to the treatment of the Residence and Other baskets. With the statutory classification of all business services as competitive, both baskets will include only residence services. More specifically to residence services, the Commission originally placed "core", relatively inelastic residence services in the Residence basket and subjected them to an absolute price cap for the first five years of the Plan; "discretionary" residence services were assigned to the Other basket, so that the Company would have upwards pricing flexibility with respect to these latter services. 1994 Order, p. 69. However, the absolute price cap period has ended and there has been no upwards pricing flexibility for any service in any basket. Thus, maintaining separate baskets is not necessary to further any relevant pricing policy objectives.[5] Even without the mandated packages, continued enforcement of this artificial separation cannot be justified on policy grounds.

With the advent of the mandated packages, this line that was originally drawn between "core" and "discretionary" services can no longer be maintained. As discussed previously, there will be core services like network access lines in both baskets and there will be discretionary services like vertical features in both baskets. Basket assignments will not depend on logical divisions between services based on their characteristics (or elasticities). Rather, the service-related revenue assignments will be based on the vagaries of customer choice: i.e., how many customers prefer to subscribe to one of the mandated packages, as compared to a voluntary package offered by Ameritech Illinois or choose to subscribe to no package at all and instead buy services on an à la carte basis. There is no logic to having two baskets under these

[5] It should be further noted that the basket structure was not intended to and should not be used to force rate reduction in any particular category of services within a customer group. The Plan was designed to afford the Company reasonable discretion in deciding what rates to change and when to change them, within the baskets. 1994 Order, pp. 70-71.

circumstances.

Furthermore, even under the 1994 Order, basket assignments have frustrated improvements in rate design. For example, nonrecurring charges -- which are currently assigned to the Other basket -- never belonged in a "discretionary" service basket at all. Nonrecurring charges (e.g., charges to install new service) are an important component of universal service: customers cannot obtain service without paying them. They are not and never were "discretionary" in the way that vertical services and optional calling plans are discretionary. Moreover, changes in nonrecurring and recurring rates for basic residence service have offsetting impacts on universal service and these interrelationships can be better managed within a single basket. (Am. Ill. Ex. 9.0, p. 9; Tr. 2162). Consolidating the two baskets would also moot Staff's arguments -- which were properly rejected by the Proposed Order -- about the proper assignment of optional calling plans. (PEPO, p. 104). [6].

Finally, the Company has pointed out that continued pressure to reduce rates in the Residence basket that have little or no margin over cost today (i.e., network access lines and Bands A and B usage) may not be viable over the long run. (Am. Ill. Init. Br. on New Legislation, pp. 11-12). Pricing policies which keep core residence service rates low and discretionary feature and other rates high simply encourage competitors to seek out and serve communications intensive households and to ignore customers who make less use of the network. Prices for services in the Residence basket have already decreased every year for six years. Whatever one's view of the merits of increasing the prices for basic services like network access lines, continuing to require decreases will not promote this Commission's procompetitive policies. In addition, at some point, the Company will hit price floors for these services (i.e.,

[6] Nonrecurring charges, vertical features and optimal calling plans in the Residence basket and these comprise 90% of what is today in the Other basket. (Am, Ill. Init. Br. on New Legislation, p. 12).

LRSIC and/or imputation). From an economic perspective, social welfare will be maximized if the Company has more freedom to take required rate reductions on the higher margin services, such as those in the Other basket. These issues are ignored completely in the Proposed Order.

Based on a full consideration of the relevant policy issues, the Residence and Other baskets should be consolidated as proposed by Ameritech Illinois. Replacement language for this section is contained in Attachment A.

III. RATE REINITIALIZATION

Ameritech Illinois supports the Proposed Order's resolution of the rate initialization issue.[7] Specific to the impact of the new legislation, the Company agrees that the Illinois General Assembly's decision not to modify Section 13-506.1 in the face of the Appellate Court's decision that Section 13-506.1 does not require regulation of earnings to prohibit "excess profits" fatally undermines GCI/City's statutory arguments in support of rate reinitialization. As cited in the Proposed Order, the Appellate Court stated as follows:

> "CUB asserts, without support, that the original purpose of the Act was to protect 'the public from public utilities charging rates that produce excess profits.' CUB argues that Section 13-506.1 'subverts' this original purpose
>
> Assuming arguendo that CUB is correct about the purpose of the Act and its 'subversion' by Section 13-506.1, this does not render Section 13-506.1 beyond the state's police power. The police power provides the authority to legislate for the public good; it does not specifically define the public good or the manner in which the legislature should act pursuant to its police power. The police power, therefore, does not mandate legislation to prevent excess profits. Even if the [Public Utilities] Act's purpose were to prevent excess profits, this would not require all subsequent regulation of public utilities to share this purpose." Illinois Bell Telephone Company v. Illinois Commerce Commission, 283 Ill. App. 3d 188 at 202, 669 N.E. 2d 919 (2d Dist. 1996). (PEPO, pp. 146-47).

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7 Although the Company initially expressed concerns about certain aspects of the analysis in its Brief on Exceptions, those concerns have generally been resolved. (Am. Ill. Br. on Exceptions, p. 5-10).

Since CUB/AG previously took issue with this interpretation of the Appellate Court's decision, Ameritech Illinois assumes that GCI/City will make similar arguments here.[8] In their response to Ameritech Illinois' Motion to Dismiss their earnings complaint (Docket 00-0764), CUB/AG claimed that the Appellate Court had not said what it clearly said and had instead "specifically rejected the notion that adoption of alternative regulation under Section 13-506.1 of the Act would preclude future analysis of an affected carrier's earnings under traditional rate of return principles."" (CUB/AG Response, p. 4, emphasis added). CUB/AG cited the following unpublished section of the decision in support of this novel interpretation:

> "The order does provide that rates filed under that plan shall enjoy a presumption that they are just and reasonable and, absent special circumstances, shall become effective without suspension or investigation under [a]rticle 9 of the Act. We read this language as merely cautioning parties contemplating a rate challenge that the Commission will dispose of frivolous complaints in a summary manner. The ability to bring complaints concerning unjust or discriminatory rate is set forth in the Act. (See ILCS 5/9-250, 10-108, 13-506.1(e) (West 1994).) Administrative agencies, like the Commission, are creatures of statute (Granite City Division of National Steel Co. v. Pollution Control Board (1993), 155 Ill. 2d 149, 171), and thus derive their power from the legislature (Business & Professional People III, 146 Ill. 2d at 195). As such, the Commission lacks the authority to ignore any portion of its enabling statute. (See Eckman v. Board of Trustees for the Police Pension Fund (1986), 143 Ill. App. 3d 757, 765. Therefore, the Commission may not create an irrebuttable presumption that rates are reasonable and just; neither may the Commission refuse to consider complaints brought pursuant to sections 9-250, 10-108, 13-506.1(e), or any other provision of the Act. To say that rates filed pursuant to the plan are presumed just and reasonable, is merely another way of saying that the petitioner who challenges such rates bears the burden of proof. See Illinois Power co. v. Illinois Commerce Comm'n, (1986), 111 Ill. 2d 505, 510 (Illinois Power Co. II)." (emphasis in original).

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[8] See Ameritech Illinois Motion to Dismiss in Docket 00-0764, filed December 26, 2000, p. 3; CUB/AG Response to Ameritech Illinois Motion to Dismiss, filed January 9, 2001, pp. 4-5; Ameritech Illinois' Reply to Motion to CUB/AG Response to Motion to Dismiss, filed January 17, 2001, pp. 5-6.

This discussion in no way contradicts the Appellate Court's clear and unambiguous disposition of CUB's earnings-based challenge to Section 13-506.1. As the quotation makes clear, the Appellate Court concluded only that the Commission could not create an irrebuttable presumption that rates under an alternative regulation plan are "just and reasonable". As the Court explains, notwithstanding adoption of an alternative regulation plan, rate complaints may be brought under Sections 9-250, 10-108 and 13-506.1(e) of the Act. Nowhere in this discussion does the Court describe what standard should be applied in deciding whether rates are just and reasonable under such a plan, nor does it even remotely suggest that an earnings standard is relevant. On its face, the statutory language in Section 13-506.1 clearly distinguishes alternative regulation from earnings-based, rate of return regulation and the Appellate Court just as clearly rejected CUB's argument that earnings-based regulation is required. Therefore, the Proposed Order's reliance on the legislature's decision not to change Section 13-506.1 is proper.[9]

IV. WHOLESALE SERVICE QUALITY

The original Proposed Order declined to expand the Alternative Regulation Plan to include wholesale service quality and penalties. That Proposed Order concluded that the Commission could address wholesale service quality in Docket 01-0120. The Proposed Order

[9] The Proposed Order now includes a summary of each party's position on issues related to Ameritech Illinois' cost of capital, depreciation, rate base and expenses for the year ending December 31, 1999.(PEPO, pp. 121-139). The Proposed Order does not contain any conclusions regarding those issues or an analysis of the Company's "revenue requirement." Ameritech Illinois may not comment on these additions to the Proposed Order because they are not based, in whole or in part, on the new legislation. As the Company explained in its Reply Brief on Exceptions, if the Commission were to determine that an analysis of Ameritech Illinois earnings and revenue requirements is necessary and appropriate (and it is not), it would be necessary for the Commission, pursuant to 220 ILCS 5/10-111, to (i) direct the Administrative Law Judges to prepare another revised Proposed Order setting forth findings and conclusions on the revenue requirements and rate design issues and (ii) provide the parties with an opportunity to respond to those findings and conclusions, as well as to comment on the accuracy and completeness of the revised PEPO's summary of the parties' positions on those issues.

also noted, "Issues concerning wholesale service quality can also be addressed in a wide variety of other proceedings, as Ameritech Illinois has observed." Moreover, the Proposed Order found, "The record in this proceeding is simply inadequate to address, in any meaningful way, the issues of wholesale service quality." (HEPO, Section VII, G, 3, Commission Analysis and Conclusion). Those conclusions were clearly correct.

The revised Proposed Order continues to find that wholesale service quality should not be included in the Alternative Regulation Plan. However, as revised, the Proposed Order now attempts to justify that conclusion by fundamentally re-writing Merger Condition 30, based on a reading of the Merger Order that is flatly inconsistent with the explicit language of that order and the positions of the parties in this proceeding. The newly proposed conclusion on this issue, if adopted, would be clearly erroneous.

The Commission's Merger Order explicitly provides, "Except where other termination dates are specifically established, all conditions set out below shall cease to be effective and shall no longer be binding in any respect three years after the Merger Closing Date." Merger Order, p. 239.[10] The Merger Order does not "specifically establish" any "other termination dates" for Merger Condition 30, so the generally applicable three-year limitation clearly applies. Merger Order, pp. 255-60.

The issue in this proceeding arose because both Staff and the CLECs recognized that the three-year limit in the Merger Order applied to Merger Condition 30. For example, AT&T witness Hegstrom testified:

> "Condition 30 requires Ameritech Illinois to take 122 performance measurements used by its parent company, SBC, and, after making necessary modification for this state, implement them here. In addition, the Commission also requires Ameritech Illinois to use a performance penalty plan where Ameritech Illinois provides substandard wholesale

10 The merger closed in October 1999.

> services to CLECs. Condition 30 expires, however, within three years of the merger closing date, i.e., October 2002." (AT&T Ex. 1.0, p. 10 (emphasis added)).

Staff witness McClerren also noted the three-year limitation—although he stated that other, unidentified language in the Merger Order might indicate something to the contrary. Mr. McClerren testified:

> "I recommend wholesale performance measures be included in this proceeding to clearly survive the three year time limit of Condition 30 in Docket 98-0555 . . . . The problem, from my perspective, is that Condition 30 may arguably have a date after which it is no longer in effect. In Docket 98-0555, the Order states:
>
> > 'Except where other termination dates are specifically established, all conditions set out below shall cease to be effective and shall no longer be binding in any respect three years after the Merger Closing Date.' (Order, p. 237).
>
> While there is other language in the Order that may arguably indicate that Condition 30 does not end three years after the Merger Closing Date, I believe the Commission has an opportunity in this proceeding to prevent any potential misunderstanding in the future . . . .
>
> Accordingly, I recommend that the Commission institute a wholesale service quality plan that would start in October 2002, clearly surviving the 'three years after Merger Closing Date' limitation that may apply to Condition 30." (Staff Ex. 8.0, p. 17 (emphasis in original)).

Mr. McClerren never identified the "other language" to which he referred, and no party ever affirmatively argued that Merger Condition 30 survives beyond the three-year limit.

The revised Proposed Order suggests, for the first time, that Paragraph 11 of Merger Condition 30 contains a termination date other than the one that applies to the merger conditions generally. (PEPO, pp. 197-99). That paragraph states, in relevant part:

> "For a minimum of one year following the Merger Closing Date, and thereafter on an as-needed basis as determined by Staff, participants in the collaborative process will collaborate to implement any additions, deletions, or changes to the performance measurements, standards/benchmarks, and remedies that are implemented by SBC/Ameritech in Illinois." Merger Order, pp. 259-60.

That language cannot support the proposition that Merger Condition 30 would last indefinitely "on an as-needed basis as determined by Staff," for several reasons.

First, the quoted language applies by its express terms only to "any additions, deletions, or changes to the performance measurements, standards/benchmarks, and remedies implemented" under Merger Condition 30, not to the effectiveness of the condition itself. That language allows the collaborative participants to modify the performance plan during its three-year term "for a minimum of one year" and then "thereafter" (that is, in the second and third years) "on an as-needed basis as determined by Staff." Merger Order, pp. 259-60. Thus, the individual measures, benchmarks and penalties associated with Merger Condition 30 are subject to modification during its three-year term, but the condition itself terminates after those three years.

Second, the language relied upon cannot reasonably be read to "specifically establish" any "other termination dates" for Merger Condition 30. Merger Order, p. 239. To the contrary, the language quoted in the Proposed Order—"on an as-needed basis as determined by Staff"—is entirely non-specific and contains no termination date at all. By contrast, when the Commission "specifically established" certain "other termination dates" for any of the order's other conditions, it did so very clearly. For example, Merger Condition 1 provides, "For not less than five years following the Merger Closing Date, SBC/Ameritech will maintain Ameritech Corporation headquarters and an Ameritech Illinois state headquarters in Illinois staffed sufficiently to maintain Ameritech Illinois' current local presence with government entities and community organizations." Merger Order, p. 239 (emphasis added). Merger Condition 19 states, "The Joint Applicants agree that AI will provide, for a period of up to five years (with 3 years mandatory and 2 years conditioned) after the Merger Closing Date, a confidential Annual Report in which it identifies any proposed 'best practices' whose adoption by SBC or its affiliates would affect the provisioning of intrastate telecommunications in Illinois." Id., p. 243

(emphasis added). Similarly, Merger Condition 21 says, "Joint Applicants will not seek local exchange certification for their National-Local Subsidiary in Illinois prior to January 1, 2003." Merger Order, p. 244 (emphasis added). The vague and indefinite language of Paragraph 11 of Merger Condition 30 is far different from the very explicit language of Merger Conditions 1, 19, and 21, each of which clearly sets a specific termination date beyond three years.

Third, the Commission could not lawfully delegate to Staff the substantive authority to determine when the obligations of Merger Condition 30 would terminate, "on an as-needed basis as determined by Staff." Merger Order, p. 259. The Merger Order is an order of the Commission itself. Staff can be delegated the ministerial task of determining whether continued collaboratives are necessary to fine-tune the provisions in Merger Condition 30, but not the substantive task of determining whether the condition itself would continue. See Board of Trustees v. Illinois Educational Labor Relations Bd., 173 Ill. App. 3d 395, 414-15 (4th Dist. 1988) (agency may not delegate to its staff the ability to determine "substantive rights").

The Proposed Order suggests, "It is illogical to presume that the actual outcome of the collaboratives, i.e., the performance measures themselves, would be subject to the timeline limitation of the Merger Order." (PEPO, p. 198). In fact, that conclusion is not only logical, it is required by the clear language of the order. The Commission anticipated that collaboratives would be conducted primarily in the first year. Thus, the "actual outcome" of the collaboratives would remain in place for two more years before Merger Condition 30 expired, possibly subject to additional modifications. That is not illogical. More importantly, it is absolutely clear that virtually all of the "actual outcomes" of the Merger Order were meant to extend for only three years, and longer terms were to be provided only by clear and express language to the contrary. The Merger Order states: "Except where other termination dates are specifically established, all conditions set out below <u>shall cease to be effective and shall no longer be binding in any respect</u> three years after the Merger Closing Date." <u>Merger Order</u>, p. 239 (emphasis added).

The Proposed Order also argues, "Not even Ameritech, the party most likely to gain, has urged such an unreasonable construction." (PEPO, p. 198). The Proposed Order misunderstands Ameritech Illinois' position. Ameritech Illinois has not previously addressed the termination date of Merger Condition 30 in this docket because: (1) the Merger Order is completely clear and (2) no party to this proceeding argued that the three-year limit did not apply to that condition. Thus, Ameritech Illinois did not address the issue because, until the revised Proposed Order was issued, there was no issue to be addressed. Ameritech Illinois' understanding of the Merger Order is, and always has been, that Merger Condition 30 expires in October 2002—just as the order says it does.

The Proposed Order also speculates that the CLECs' petition to initiate Docket 01-0120 somehow provides "evidence" that Merger Condition 30 lasts for more than three years. (PEPO, pp. 198-99). This assertion is wrong for several reasons. Most obviously, the petition is simply a pleading filed by interested parties; it proves nothing about the meaning of the Merger Order. Second, the petition is not a part of the record in this proceeding and cannot be lawfully considered as "evidence" of anything here. 220 ILCS 5/10-103. Finally, the Proposed Order misconstrues the petition in Docket 01-0120. In fact, the same CLECs that filed that petition (plus others) have clearly stated that Merger Condition 30 terminates after three years. In their brief in that proceeding, the CLECs stated: "The conditions of the merger, including the one addressing remedy plans, Condition 30, had a lifespan of only three years. Indeed, with the merger occurring almost two years ago, unless the life of the remedy plan were extended, it would expire in little over a year now." Br. of Competitive Local Exchange Carriers, Ill. C.C.

Dkt. 01-0120, p. 53 (Sept. 27, 2001).(administrative notice requested)[11] In fact, one of the central issues raised by the CLECs in Docket 01-0120 is whether the remedy plan being developed in that proceeding should extend beyond October 2002, "when Merger Condition 30 expires." Id.

Ameritech Illinois emphasizes that the conditions of the Merger Order were voluntary commitments made by SBC and Ameritech. Merger Order, pp. 239, 262. As the Commission recognized, many of the commitments address subjects that would have been beyond the Commission's jurisdiction or outside the scope of the merger proceeding, but for the willingness of SBC and Ameritech to make those commitments part of the Merger Order. Id. at 239. Because SBC and Ameritech acted in reliance on the mutual commitments in the Merger Order, the Commission may not now unilaterally extend the term of Merger Condition 30 simply by nullifying the existing termination date. See Village of Palatine v. LaSalle National Bank, 112 Ill. App. 3d 885, 893 (1st Dist. 1983) (substantial change in position by party, in reliance on administrative decision, creates vested right).

Moreover, this case provides no factual or policy basis upon which to extend Merger Condition 30. As the original Proposed Order found, "The record in this proceeding is simply inadequate to address, in any meaningful way, the issues of wholesale service quality." (HEPO, Section VII, G, 3, Commission Analysis and Conclusion). That statement is clearly correct. Merger Condition 30 includes 122 different performance measures and associated benchmarks. Merger Order, p. 257. For the vast majority of those measures and benchmarks, the record in this case contains no evidence at all regarding their continued viability and appropriateness. For

[11] The brief was filed on behalf of the Association of Communications Enterprises, AT&T Communications of Illinois, Inc., CoreComm Illinois, Inc., Focal Communications Corporation, McLeodUSA Telecommunications Services, Inc., TCG Chicago, TCG Illinois, TCG St. Louis, Time Warner Telecom of Illinois, Inc., WorldCom, Inc., and XO Illinois, Inc.

the rest, the record contains, at most, extremely brief descriptions of a few of the measures proposed by some of the CLECs. (See Cox, McLeod Ex. 1.1, pp. 1-3). As a result, there is no record upon which the Commission can possibly determine whether those measures and benchmarks should remain in place.

At the same time, as the original Proposed Order found, there are several other proceedings in which wholesale service quality are being addressed or could be addressed: "Issues concerning wholesale service quality can also be addressed in a wide variety of other proceedings, as Ameritech Illinois has observed." (HEPO, Section VII, G, 3, Commission Analysis and Conclusion). This finding was also clearly correct. There are at least two currently pending dockets addressing wholesale service quality: Docket 01-0120 (which addresses remedies applicable to the existing Merger Condition 30 measures and benchmarks) and Docket 01-0539 (the wholesale service quality rulemaking, pursuant to 220 ILCS 5/13-712(g) of the Public Utilities Act). In addition, and more importantly, Ameritech Illinois will soon be filing its application for permission to provide long-distance service pursuant to Section 271 of the federal Telecommunications Act of 1996. Ameritech Illinois anticipates that wholesale service quality will be a central issue in that process. Ameritech Illinois also notes that wholesale service quality performance plans have typically been imposed by the FCC in its orders approving Section 271 applications.

In any event, the concern of Staff and the CLECs that the termination of Merger Condition 30 will leave CLECs without a wholesale performance plan is unfounded. As Ameritech Illinois has made clear in Docket 01-0120, it has no intention of scrapping its performance assurance system at the end of the three-year term of Merger Condition 30. Ameritech Illinois views its performance assurance plan as an important part of its application for long-distance entry under Section 271 of the federal Telecommunications Act of 1996, and it will submit a proposal for providing such a plan beyond the termination date of Condition 30 as part of the upcoming 271 docket. Br. Of Am. Ill., Ill. C.C. Dkt. 01-0120, pp. 67-68 (Sept. 27, 2001).

In summary, the revised Proposed Order's conclusion concerning Merger Condition 30 would, if adopted, be erroneous. The Commission should therefore reject the proposed findings and restore the findings of the original Proposed Order on this issue, as modified, as proposed in Attachment A.

V. OTHER ISSUES

1. IMPROPER CLASSIFICATION PENALTIES

The Proposed Order continues to properly reject Staff's and GCI/City's proposal that Ameritech Illinois be assessed a penalty of $10,000 per day for any competitive service classification which the Commission ultimately concluded was inappropriate after a hearing. (PEPO, pp. 119-21). In doing so, the Proposed Order notes that the legislature did not, in H.B. 2900, amend the PUA to allow for penalties as proposed by Staff and GCI/City. (Id., pp. 120-21) This analysis is correct and should be affirmed by the Commission.

In this regard, AT&T may resurrect its argument that H. B. 2900 "gives the Commission express statutory authority to impose penalties (see Sections 13-304 and 13-305), including penalties for improper reclassification." (AT&T Init. Br. on New Law, p. 3). There is nothing in the language of Sections 13-304 or 13-305 which expressly (or even implicitly) supports AT&T's argument. Neither Section includes any reference to penalties for "improper reclassification." Section 13-305 tracks the language of Section 5-202 of the Act (applicable to telecommunications carriers prior to July 1, 2001) insofar as it authorizes the assessment of civil penalties for failure to comply with the Act or to obey a Commission order or rule. Thus, Section 13-305 does not in any way broaden the scope of the conduct for which civil penalties may be assessed beyond the conduct for which such penalties could have been assessed under Section 5-202 prior to the enactment of H.B. 2900. Rather, the purpose of Section 13-305 was to increase the maximum amount of civil penalties which may be assessed against telecommunications carriers for conduct which otherwise would have been subject to the lower amount of civil penalties set forth in Section 5-202. Section 13-304 provides that the Commission may assess the civil penalties authorized by Section 13-305 only after notice and an opportunity to be heard, and sets forth mitigating factors which the Commission must consider in determining the amount of civil penalties to assess.

Moreover, Section 13-502(e) already provides mechanisms to ensure that the Company does not profit from, and customers are not harmed by, classifications that are later overturned. The Commission has the authority to require that rates be returned to their pre-reclassification level and that any rate increases be refunded to customers. (Am. Ill. Ex. 1.4, p. 43). H.B. 2900 amended Section 13-502 (which governs classification of services) and added Section 13-502.5 (entitled "Services alleged to be improperly classified"). As the Proposed Order correctly observes, however, the General Assembly did not incorporate into either Section language authorizing the Commission to impose a penalty of the type espoused by GCI/City, Staff and AT&T. (PEPO, p. 121). The Commission, therefore, clearly lacks the authority to impose such a penalty.

2. Rate Rebalancing

As the Proposed Order correctly notes, following the enactment of H.B. 2900, Ameritech Illinois withdrew its rate rebalancing proposal in light of the provisions of Section 13-518 which require the Company to offer certain flat rate local service packages to residential customers. (PEPO, p. 77). The Proposed Order concludes that, as a result of that withdrawal, it is unnecessary for the Commission to address and resolve contested issues regarding the Company's rate rebalancing proposal and the cost studies relied on by the Company in support of that proposal. Ameritech Illinois supports the Proposed Order's conclusion in this regard.

Based on its Reply Brief on Exceptions, GCI/City may argue that the Proposed Order is in error and that "Ameritech's attempt at unilateral withdrawal of the rate rebalancing petition be denied" because the Company did not file a "stipulation" or "motion" pursuant to Section 5/2-1009 of the Illinois Code of Civil Procedure. (GCI/City Reply Br. on Exceptions, pp. 15-16). As GCI/City acknowledged in that pleading, however, that Section does not apply to Commission proceedings. The Company's decision to withdraw the rate rebalancing proposal was based on an unforeseen change in circumstances (the enactment of Section 13-518) which occurred after the conclusion of the evidentiary hearings and issuance of the Proposed Order. GCI/City has identified no valid legal or policy basis for precluding a party to a Commission proceeding from withdrawing a proposal in such a situation.

3. <u>Technical Correction</u>

The Proposed Order contains a typographical error at page 57, concerning Ameritech Illinois' network spending. The amount "$1.043 million" should be "$1.043 <u>billion</u>." This change is also included in Attachment A.

IV. CONCLUSION

In view of the foregoing, the Proposed Order's conclusion relative to the structure of the baskets and its interpretation of the Merger Order relative to wholesale service quality should be modified.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Louise A. Sunderland, an attorney, hereby certify that copies of the foregoing Second Brief on Exceptions of Ameritech Illinois were served upon the parties on the attached service list via electronic mail and/or by Federal Express on October 18, 2001.

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